

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

KENNETH N. CAIN §
v. § CIVIL ACTION NO. 5:11cv144
LONNIE SMITH, ET AL. §

MEMORANDUM ADOPTING PRELIMINARY REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Plaintiff Kenneth Cain, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Cain originally sued Sgt. Lonnie Smith, Lt. Ricky Leaks, and the State of Texas. He alleged that Smith hit him with a pair of handcuffs and Leaks “stood by and watched it happen.” The Magistrate Judge ordered Cain to file an amended complaint setting out a short and plain statement of his claims, and Cain did so.

In his amended complaint, Cain named only Smith and the State of Texas, omitting any reference to Leaks. He described the assault by Smith and stated that the State of Texas was liable because it employed Smith and was responsible for Smith’s actions.

After review of the amended complaint, the Magistrate Judge issued a preliminary report recommending that the claims against Leaks be dismissed without prejudice because he was dropped from the amended complaint, and that the claims against the State of Texas be dismissed as barred by the Eleventh Amendment. Cain received a copy of this Report on October 27, 2011, but filed no objections thereto; accordingly, he is barred from *de novo* review by the district judge of those

findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has carefully reviewed the pleadings and documents in this case, as well as the Preliminary Report of the Magistrate Judge. Upon such review, the Court has concluded that the Preliminary Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Preliminary Report of the Magistrate Judge is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the Plaintiff's claims against the State of Texas be and hereby are DISMISSED with prejudice and for failure to state a claim upon which relief may be granted. It is further

ORDERED that the Plaintiff's claims against the Defendant Ricky Leaks be DISMISSED without prejudice. Finally, it is

ORDERED that the dismissal of these claims and parties not count as a strike for purposes of 28 U.S.C. §1915(g).

SIGNED this 14th day of December, 2011.



DAVID FOLSOM
UNITED STATES DISTRICT JUDGE